

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



# COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1906.

No. 1677.

No. 4 Special Calendar.  
October Term 1906

## No. 10, SPECIAL CALENDAR.

HARRY J. McGOWAN AND JESSE A. McGOWAN,  
APPELLANTS,

*vs.*

ELLA ELROY, JOHN H. SIMMS, ANNIE GILL AND JOHN GILL (HER HUSBAND), HARRY SIMMS, WILLIAM SIMMS, LILLIE HALL AND GEORGE HALL (HER HUSBAND), SALLIE EBERHART AND JOHN EBERHART (HER HUSBAND), EDNA CLARK, SARAH STARNELL, IDA GERMAN AND GEORGE GERMAN (HER HUSBAND), MARY ENGLISH AND JAMES ENGLISH (HER HUSBAND), JOHN W. ELLIOTT, VIRGINIA McLANE AND WILLIAM McLANE (HER HUSBAND), AND LILLIE MILLS AND CARY MILLS (HER HUSBAND).

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

### INDEX.

	Original.	Print.
Caption .....	<i>a</i>	1
Bill of complaint.....	1	2
Demurrer.....	13	9
Decree sustaining demurrer, &c..	15	10
Amended bill.....	16	10
Demurrer to amended bill.....	27	17
Decree overruling demurrer .....	28	18

	Original.	Print.
Answer to amended bill.....	29	18
Joinder of issue....	35	21
Decree canceling deed, &c.....	36	22
Petition for rehearing.....	39	23
Petition overruled and dismissed, &c. ....	42	25
Petition for leave to file bill of review .....	43	26
Rule to show cause.....	56	33
Demurrer.....	57	33
Rule to show cause discharged and demurrer sustained.. ..	58	34
Allowance of special appeal.....	59	35
Order fixing amount of appeal bond .....	60	35
Memorandum : Appeal bond approved and filed.....	60	35
Directions to clerk for preparation of transcript on appeal.....	61	36
Citation.....	62	36
Clerk's certificate.....	63	37

# In the Court of Appeals of the District of Columbia.

---

No. 1677.

HARRY J. MCGOWAN ET AL., Appellants,

vs.

ELLA ELROY ET AL.

---

*a* Supreme Court of the District of Columbia.

Equity. No. 23267, Docket 52.

ELLA ELROY, JOHN H. SIMMS, ANNIE GILL and JOHN GILL, Her Husband; HARRY SIMMS, WILLIAM SIMMS, LILLIE HALL and GEORGE HALL, Her Husband; SALLIE EBERHART and JOHN EBERHART, Her Husband; EDNA CLARK, an Infant, by Her Next Friend, JOHN H. SIMMS; SARAH STARNELL, IDA GERMAN and GEORGE GERMAN, Her Husband; MARY ENGLISH and JAMES ENGLISH, Her Husband; JOHN W. ELLIOTT, VIRGINIA McLANE and WILLIAM McLANE, Her Husband; LILLIE MILLS and CARY MILLS, Her Husband; Complainants,

vs.

HARRY J. MCGOWAN and JESSE A. MCGOWAN, CHARLES A. HEFFERMAN, Defendants.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

*Bill of Complaint.*

Filed April 19, 1902.

In the Supreme Court of the District of Columbia.

Equity. No. 23267, Docket 52.

ELLA ELROY, JOHN H. SIMMS, ANNIE GILL and JOHN GILL, Her Husband; HARRY SIMMS, WILLIAM SIMMS, LILLIE HALL and GEORGE HALL, Her Husband; SALLIE EBERHART and JOHN EBERHART, Her Husband; EDNA CLARK, an Infant, by Her Next Friend, JOHN H. SIMMS; SARAH STARNELL, IDA GERMAN and GEORGE GERMAN, Her Husband; MARY ENGLISH and JAMES ENGLISH, Her Husband; JOHN W. ELLIOTT, VIRGINIA McLANE and WILLIAM McLANE, Her Husband; LILLIE MILLS and CARY MILLS, Her Husband, Complainants,

vs.

HARRY J. MCGOWAN and JESSE A. MCGOWAN, CHARLES A. HEFFERMAN, Defendants.

To the Honorable Justice of the Supreme Court of the District of Columbia sitting in Equity:

The complainants file this their bill of complaint and respectfully show to the Court as follows:

1. That all of the said complainants are citizens of the United States; and all are residents of the State of Virginia, except the complainants, John H. Simms and William Elliott, who are residents of the District of Columbia, and Virginia McLane and William McLane, her husband, who are residents of Frederick County, in the State of Maryland. That all of the said complainants bring this suit in their own right and as heirs at law of Susan Turner, deceased, except John Gill, who sues as the husband of Annie Gill, George Hall, who sues as the husband of Lillie Hall, John Eberhart, who sues as the husband of Sarah Eberhart, George German who sues as the husband of Ida German, and James English, who sues as the husband of Mary English, and William McLane, who sues as the husband of Virginia McLane.

2. That the defendants Harry J. McGowan and Jesse A. McGowan, are residents of the District of Columbia, and are sued in their own right and capacity, as hereinafter particularly set forth. The other defendants are sued as the heirs at law of Patrick Hefferman, deceased, who was one of the trustees in a certain deed in trust from Henry L. Turner *et als.* to the said John P. Pepper, who died without heirs and Patrick Hefferman, dated February 10th, 1854, and recorded in liber J. A. S., No. 70, folio 1, *et seq.*, of the Land Records of the District of Columbia.

3. That the said complainants, excepting John Gill, George Hall, John Eberhart, George German, James English and William McLane, are the only heirs at law and next of kin of the said Susan

Turner, deceased, who died in the city of Washington, and District aforesaid, on the — day of December, A. D. 1801, intestate, and without any husband or children surviving her.

4. That the said Susan Turner had two sisters, to wit, Margaret Simms and — Elliott, both of whom predeceased the said Susan Turner, and both of whom also died intestate, leaving issue and children as follows: The children of Margaret Simms, deceased, were the said complainant, Annie Gill and Noble Simms and Randolph Simms, and that said Noble Simms and Randolph Simms died before the said Susan Turner, and that each of them died intestate. That the said Noble Simms, deceased, left no widow surviving him, but did leave the said complainant, Ella Elroy and John Simms,

his only children, heirs at law, and next of kin, surviving  
3 him. That the said Randolph Simms left a widow, —

Simms, surviving him, and also the following children, his heirs-at-law and next of kin, viz., the said complainants, Harry Simms, William Simms, and Lillie Hall, who intermarried with the complainant George Hall, Sallie Eberhart, who intermarried with complainant, John Eberhart, and also Carrie Clark, who intermarried with Ernest Clark, deceased, and died on or about the — day of — intestate, leaving the complainant, Edna Clark, an infant of the age of twelve years, as her only heir at law and next of kin surviving her.

That the children of the said — Elliott, deceased, are the complainants Sarah Starnell, a widow, Ida German, who intermarried with the complainant George German, Mary English, who intermarried with the complainant James English, Virginia McLane, who intermarried with the complainant William McLane, Lillie Mills, who intermarried with the complainant Cary Mills and John W. Elliott, and that said children are the only heirs at law and next of kin of the said — Elliott, deceased.

5. That on or about the 10th day of February, 1854, Henry L. Turner, deceased, the then husband of the said Susan Turner, deceased, joining with certain others as grantors, conveyed to John P. Pepper and Patrick Hefferman in trust for the said Susan Turner "all that part of original lot numbered Four (4) in Square numbered Two Hundred and Twenty seven (227), situate in the City of Washington, and District of Columbia, and contained within the following metes and bounds, viz.—Beginning for the same at the dividing line on North "D" Street between lots numbered five (5) and four (4) in said square, and running thence North along said

dividing line ninety-five feet (95) three (3) inches, to the  
4 rear of said lot; thence eastwardly along the rear line of said lot thirteen (13) feet eight and one half ( $8\frac{1}{2}$ ) inches; thence southwardly at right angles, parallel to said dividing line between lots numbered five (5) and four (4), ninety-five (95) feet, three (3) inches, to North "D" Street; thence westwardly along the line of said "D" street, thirteen (13) feet, eight and one half ( $8\frac{1}{2}$ ) inches, to the dividing line between said lots five (5) and four (4), at the place of beginning; the same comprehending the west one fourth full part of said lot numbered Four (4) in said Square, with

the use of the alley between said part of said lot and the part adjoining it on the East side, in common to both parcels," which said deed is duly recorded in liber J. A. S., number 70, folio 1, *et seq.*, one of the land records of the District of Columbia, a duly certified copy of said deed in trust is herewith filed and marked "Complainants' Exhibit No. 1," and is prayed to be taken and read with the Bill of Complaint as a part hereof. That the said Henry L. Turner, died long prior to the death of the said Susan Turner, and that the said trustees, John P. Pepper and Patrick Hefferman also died long prior to the death of the said Susan Turner, and without having made any release or conveyance whatsoever of the aforesaid described property, and that the legal title thereto descended to their respective heirs at law, and is now outstanding in them.

6      6. That upon the conveyance aforesaid to the said trustees for the benefit of the said Susan Turner, she entered into possession of the said real estate, and occupied the same up to the time of her death, the said premises being known as No. 1423 D Street, northwest, in the said City of Washington, and that she conducted  
5      and carried on the business of a boarding house at the said premises for many years, and until she became incapacitated to conduct the said business as hereinafter shown and set forth, and that she derived income and profits from the said business, besides having other moneys invested in interest bearing securities or loaned out on interest.

7. That the said defendants Harry J. McGowan and Jessie A. McGowan are the children of a deceased half sister of the said Susan Turner; that their mother died when they were quite young, and that they, with their father, after the death of their mother, resided at the home of the said Susan Turner at said premises, and after their father's death they continued to reside on the said premises with the said Susan Turner up to the time of her death.

8. That the said Susan Turner by a certain paper writing purporting to be a deed of conveyance dated on the 29th day of March, 1901, and recorded in the Office of the Recorder of Deeds of the District of Columbia, on the 30th day of March, 1901, in Liber 2554, folio 274, *et seq.*, purported to convey in fee simple to the said defendants, Harry J. McGowan and Jesse A. McGowan, the said real estate mentioned and set forth in the fifth paragraph of this Bill, for the pretended consideration of Ten Dollars (\$10.00) and that complainants aver that said conveyance was without any consideration, valuable or otherwise whatsoever. A duly certified copy of the said paper writing is herewith filed and marked "Complainants' Exhibit No. 2," and is prayed to be taken and read with this Bill of Complaint as a part hereof.

9. That at the time of the pretended conveyance of said piece or parcel of land described in the fifth paragraph hereof, the said Susan Turner was, and for a long time prior thereto, had  
6      become, by reason of old age, she being a woman of the age of eighty-three years and upwards, and physical weakness resulting therefrom and bodily infirmities produced by paralysis and other diseases or complaints, a person of extreme mental weakness

and loss of memory, and was incapacitated thereby from understanding the nature of any acts or deeds by her done or performed or attempted to be done or performed requiring the exercise of judgment or discretion; and although she could formerly read and write, yet at the time of the pretended conveyance herein set forth, she was physically and mentally incapacitated from writing her name, and for some years prior thereto she was an invalid and endured much suffering, having had several strokes of paralysis and she was thereby made unable to walk and had to be nursed and treated with the care and attention of a helpless baby. That her memory was greatly impaired so much so that she failed to remember and recognize her own relatives; that her speech was affected by the ailments from which she suffered, and her conversation was incoherent, caused by mental weakness and loss of memory.

10. That the said defendants, Harry J. McGowan and Jesse A. McGowan, by reason of their long continued residence at the home of the said Susan Turner and of the further fact that they were children of a deceased half sister, had acquired great control and influence over her, and being young men of intelligence and good business capacity were at the time of the alleged making and execution of the said paper, and for a long time prior thereto, had been acting in a fiduciary and confidential capacity for the said Susan Turner and attending to and controlling by reason of her incapacity, all of her

7 business matters, and she reposed implicit confidence in them and such confidence on her part continued down to and including the time of the making and execution of said paper and any and all papers made by her.

11. That the said defendants, Harry J. McGowan and Jessie A. McGowan, who had resided on said premises with the said Susan Turner during the time aforesaid and were so residing at the time of her death, have by means of her mental weakness hereinbefore referred to of the said Susan Turner, and her incapacity and inability to transact and do business knowingly and understandingly, and because of their long residence in said house and close association with the said Susan Turner in the fiduciary and confidential relation aforesaid and the confidence thereby induced and reposed in them and each of them as aforesaid, acquired an undue influence over the said Susan Turner to an extent sufficient to control the free action of her will and prevent any true consent by her to any act or deed done or performed by the said Susan Turner, and that because of said undue influence and the pressure brought to bear on her, and because of her condition, physical and mental, and of the threats and importunities of the said defendants, Harry J. McGowan and Jessie A. McGowan, which the said Susan Turner had not the courage or power to resist for the reason aforesaid, and because of the presence of the defendants who acted for her in the fiduciary and confidential capacity aforesaid, and the confidence reposed in them as aforesaid, and while she was under duress, the said defendants, Harry J. McGowan and Jessie A. McGowan fraudulently and illegally obtained from the said Susan Turner the alleged conveyance to them hereinbefore referred to; and the com-

plainants are informed and believe, and so allege, that the said pretended deed was prepared or caused to be prepared by the said Harry J. McGowan and Jessie A. McGowan.

12. Complainants are informed and believe and so charge the facts to be that the said Harry J. McGowan and Jessie A. McGowan after obtaining the said pretended deed from the said Susan  
8 Turner under the circumstances set forth in the ninth, tenth and eleventh paragraphs of this Bill, and that at about the time of her death, they advertised the said real estate, mentioned in said paper, for sale, and have so continued to advertise the same, and have endeavored and are endeavoring to sell the same, and procure the proceeds of such sale in fraud of the just rights of the said complainants who were without knowledge or notice of the said paper or of the said fraudulent transaction, and who have only recently acquired notice thereof.

13. Complainants are informed and believe that the said defendants are in possession of the said real estate mentioned herein, and are exercising acts of ownership thereover—that said pretended conveyance of record has such an effect upon the title of the complainants to said real estate which descended to them upon the death of said Susan Turner that so long as it remains the said complainants will be unable to obtain an equitable partition of the said real estate amongst themselves by sale thereof, and a division of the proceeds amongst themselves.

14. Complainants are informed and believe and so charge that prior to the time the said paper writing purporting to be a deed of conveyance was obtained from the said Susan Turner as aforesaid, they, the said defendants, Harry J. McGowan and Jessie A. McGowan, under like circumstances and conditions as set forth in the ninth, tenth and eleventh paragraphs of this Bill, obtained from the said Susan Turner a certain other paper writing purporting to be her last will and testament, and which purports to devise to them all the real and personal property of the said Susan Turner and which paper is likewise void and of no force or effect, the same having been obtained by fraud and undue influence exercised upon the said Susan Turner, she not having been at the time the said paper  
9 was obtained from her, of sound or disposing mind, memory, and was incapable of executing a valid deed or contract, and so remained incapable and incompetent up to the time of her death; and that at said time and for a long time prior thereto her mental faculties were and had become so impaired as to render her incapable of knowing or appreciating the nature, character, value, or extent of her estate, her right to exercise dominion over same, the relatives whom she had, or the natural objects of her bounty and was and had been under the complete influence of the said last mentioned defendants. That the said last mentioned defendants, well knowing that the said pretended will was and is fraudulent, void and null, subsequently obtained from the said Susan Turner said pretended deed for the purpose of strengthening their fraudulent scheme to acquire immediate control of the said real estate, and to sell the same and secure the proceeds thereof, and in such

manner avoid filing said pretended will with the Register of Wills or offering the same for probate in the Orphans' Court well knowing that such proceedings would be contested by the said complainants—and complainants further aver upon information and belief that the said defendants last mentioned have not taken any proceedings looking to the probate thereof as a valid will or testamentary disposition. And complainants further aver that they are informed and believe that it is the intention and design of the said Harry J. McGowan and Jessie A. McGowan that in the event that this Court should set aside, cancel and annul the said pretended deed of conveyance, they will then attempt to set up and establish the said pretended will and put the said complainants to the cost and expense of another suit in relation to it, and thereby vex and greatly harrass the complainants with a multiplicity of suits and greatly delay them in the final determination of their rights.

15. That the said Susan Turner at the time of her death in addition to the said real estate was possessed of a large amount of  
10 personal property, including money, household furniture, and other estate, including debts due to her, all of which has been fraudulently seized upon by the said last named defendants, and is now in their possession and fraudulently concealed by them in the execution of their scheme to obtain, possess and appropriate for themselves all of the estate of every kind of which the said Susan Turner was seized or possessed, and thereby to deprive and defraud the complainants, the rightful owners of said property, from possessing the same.

### *Prayers.*

The premises considered, the complainants pray:

1. That process of subpoena may issue in due form and be served upon the said defendants commanding them and each of them to appear and make full answer to the allegations and statements contained in this Bill, but an answer under oath is hereby expressly waived.

2. That the said paper writing purporting to be a deed of conveyance from the said Susan Turner to the said defendants Harry J. McGowan and Jessie A. McGowan, dated March 29th, 1901, and purporting to convey the real estate mentioned in the fifth paragraph hereof, may be decreed to be delivered up by the said last mentioned defendants and filed with the papers in this cause, and that the same may be decreed cancelled and annulled and held to be null and void and of no effect, and that the said real estate therein mentioned may be adjudged to have descended to the said complainants as the heirs at law of the said Susan Turner upon her death.

3. That the said paper writing purporting to be the last will and testament of the said Susan Turner may be decreed to be delivered up by the last mentioned defendants, and filed with the papers in this cause, and may be decreed to be not her last will and testament.

11 4. That the said defendants, Harry J. McGowan and Jessie A. McGowan, and each of them, may be enjoined and re-

strained from advertising for sale or attempting to make or making sale of the said real estate or any portion thereof, mentioned in the fifth paragraph of this bill, and in said Complainant's Exhibit No. 2, filed herewith and as a part of this bill, or from mortgaging the same or creating any lien thereon, or upon any part or portion thereof until the further order of this Court, and that upon the final hearing of this cause said injunction may be decreed final and perpetual.

5. That the said defendants, Harry J. McGowan and Jessie A. McGowan, and each of them, their attorneys, solicitors, or proctors, may be enjoined and restrained from setting up, probating or offering for probate, the said paper writing purporting to be the last will and testament of the said Susan Turner, deceased, until the further order of this Court, and that upon the hearing of this cause that they and each of them may be perpetually so restrained and enjoined.

6. That a receiver may be appointed in this Honorable Court to take charge of all the real estate of which the said Susan Turner died seized, and to collect the rents, issues and profits thereof during the pendency of this suit.

7. That the said defendants, Harry J. McGowan and Jessie A. McGowan be decreed to render an account of all the rents, issues and profits of the said estate collected by them or either of them and to pay over the amount of said collections to the receiver when appointed to abide the decision of this cause.

8. That the complainants may have such other and further and general relief in the premises as the nature of their case may require, and to the Court may seem proper.

The defendants to this Bill of Complaint are Harry J. McGowan and Jessie A. McGowan and Charles A. Hefferman.

JOHN H. SIMMS.

12 CHARLES BENDHEIM AND  
EDMUND BURKE,

*Solicitors for Complainants,  
Except Ida German and George German.*

FRANK E. ANDERSON,  
*For Ida and Geo. German.*

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing Bill of Complaint by me subscribed and know the contents thereof; and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

JOHN H. SIMMS.

Subscribed and sworn to before me this 18th day of April, 1902.

[SEAL.]

VICTOR H. WALLACE,  
*Notary Public, D. C.*

13

*Demurrer.*

Filed July 29, 1902.

In the Supreme Court of the District of Columbia.

Equity. No. 23267.

ELLA ELROY ET AL., Complainants,  
*vs.*  
HARRY J. MCGOWAN ET AL., Defendants.

*Demurrer.*

The defendants say that the complainants have not stated in their bill of complaint filed herein such a case as entitles them to the relief therein prayed, or to any other relief against the defendants. Wherefore, the defendants pray the judgment of this Honorable Court whether they shall make further answer to said bill of complaint. And they pray to be hence dismissed with their costs in this behalf sustained.

HARRY J. MCGOWAN.  
JESSE A. MCGOWAN.  
CHAS. A. HEFFERMAN.

CHAS. T. HENDLER,  
*Solicitor for Defendants.*

Harry J. McGowan, being duly sworn, deposes and says that he is one of the defendants in the foregoing demurrer, and that the same is not interposed for delay.

HARRY J. MCGOWAN.

Subscribed and sworn to before me this 26th day of July, A. D. 1902.

[SEAL.]

A. E. L. LECKIE,  
*Notary Public, D. C.*

14 I hereby certify that, in my opinion, the foregoing demurrer is well founded in law and proper to be filed.

CHAS. T. HENDLER,  
*Solicitor for Defendants.*

*Decree Sustaining Demurrer, &c.*

Filed February 2, 1903.

In the Supreme Court of the District of Columbia.

Equity. 23267.

ELLA ELROY ET AL., Complainants,

*vs.*

HARRY J. MCGOWAN ET AL., Defendants.

This cause coming on to be heard on the demurrer filed by the defendants to the bill of complaint, after argument by counsel on both sides, and after consideration by the Court, it is this 2d day of February, A. D. 1903, adjudged, ordered, and decreed that the said demurrer be sustained with leave to the complainants to amend their Bill, as they may be advised, within fifteen days from this date.

It is further adjudged and ordered that the complainants pay to the defendants their costs, to be taxed by the Clerk, for which costs the defendants shall have execution as at law.

By the Court.

A. B. HAGNER,  
*Associate Justice.*

*Amended Bill.*

Filed February 17, 1903.

In the Supreme Court of the District of Columbia.

Equity. No. 22267, Docket No. 52.

ELLA ELROY, JOHN H. SIMMS, ANNIE GILL and JOHN GILL, Her Husband; HARRY SIMMS, WILLIAM SIMMS, LILLIE HALL and GEORGE HALL, Her Husband; SALLIE EBERHART and JOHN EBERHART, Her Husband; EDNA CLARK, an Infant, by Her Next Friend, JOHN H. SIMMS; SARAH STARNELL, IDA GERMAN and GEORGE GERMAN, Her Husband; MARY ENGLISH and JAMES ENGLISH, Her Husband; JOHN W. ELLIOTT, VIRGINIA McLANE and WILLIAM McLANE, Her Husband; LILLIE MILLS and CARY MILLS, Her Husband, Complainants,

*vs.*

HARRY J. MCGOWAN and JESSE A. MCGOWAN, Defendants.

To the Honorable Justice of the Supreme Court of the District of Columbia sitting in Equity:

Leave of the Court first having been had and obtained, the complainants file this their amendment of their original bill in this

to-wit: they amend their said original bill by striking out the said Charles A. Hefferman as a party defendant thereto.

Second. By striking from the second paragraph of the original bill the following words and figures,

"the other defendants are sued as the heirs at law of Patrick Hefferman, deceased, who was one of the trustees in a certain deed in trust from Henry L. Turner *et als.* to the said John P. Pepper who died without heirs and Patrick Hefferman dated February 10th, 1854, and recorded in liber J. A. S. 70 folio I *et seq.* of the land records of the District of Columbia."

17 Third. By striking from the fifth paragraph of the said original bill the words following,

"That the said Henry L. Turner died long prior to the death of the said Susan Turner, and that the said trustees, John P. Pepper and Patrick Hefferman also died long prior to the death of the said Susan Turner, and without having made any release or conveyance whatsoever of the aforesaid described property, and that the legal title thereto descended to their respective heirs at law, and is now outstanding in them."

Fourth. By omitting from the sixth paragraph of the original bill the words "to the said trustees for the benefit of."

Fifth. By omitting from the third and fourth lines of the tenth paragraph of said bill the following words, "and of the further fact that they were children of a deceased half sister;" and by striking from the last line of said paragraph the words—"and any and all papers made by her."

Sixth. By striking from the twentieth line of the 11th paragraph of said bill the word "courage," and by striking from the 21st and 22nd lines of said paragraph the words "and the confidence reposed in them as aforesaid."

Seventh. By striking from the fourth and fifth line- of the 12th paragraph of said original bill the words "in the ninth, tenth and eleventh paragraphs of this bill," and by striking from the last line of said paragraph the words, "and who have only recently acquired notice thereof."

Eighth. By omitting from the eighth, ninth, and tenth lines of the 13th paragraph of the said bill the words, "amongst themselves by a sale thereof and a division of the proceeds amongst themselves,"

Ninth. By striking out of the original bill the fourteenth and fifteenth paragraph- thereof.

Tenth. By striking out the 3rd and 5th prayers of the said original bill.

And for their amended bill of complaint in this behalf they respectfully show to the Court and state as follows:

1. That all of the said complainants are citizens of the United States, and all are residents of the State of Virginia, except the complainants John H. Simms and William Elliott, who are residents of the District of Columbia, and Virginia McLane and William Mc-

Lane, her husband, who are residents of Frederick County, in the State of Maryland. That all of the said complainants bring this suit in their own right and as heirs at law of Susan Turner, deceased, except John Gill, who sues as the husband of Annie Gill, George Hall, who sues as the husband of Lillie Hall, John Eberhart, who sues as the husband of Sarah Eberhart, George German, who sues as the husband of Ida German, and James English, who sues as the husband of Mary English, and William McLane, who sues as the husband of Virginia McLane.

19        2. That the defendants, Harry J. McGowan and Jesse A. McGowan are residents of the District of Columbia and are sued in their own right and capacity, as hereafter particularly set forth.

3. That the said Complainants, excepting John Gill, George Hall, John Eberhart, George German, James English, and William McLane are the only heirs at law and next of kin of the said Susan Turner, deceased, who died in the City of Washington, District of Columbia aforesaid, on the — day of December, A. D. 1901, intestate and without any husband or children surviving her.

4. That the said Susan Turner had two sisters, to wit, Margaret Simms, and — Elliott, both of whom predeceased said Susan Turner, and both of whom also died intestate, leaving issue and children as follows; the children of Margaret Simms, deceased, were the said complainant Annie Gill and Noble Simms and Randolph Simms, and that said Noble Simms and Randolph Simms died before the said Susan Turner, and that each of them died intestate. That the said Noble Simms, deceased, left no widow surviving him, but did leave the said complainants, Ella Elroy and John Simms, his only children, heirs at law, and next of kin, surviving him. That the said Randolph Simms left a widow, Sarah Simms, surviving him, and also the following children, his heirs at law and next of kin, viz., the said complainants, Harry Simms, William Simms, and Lillie Hall, the last named having intermarried with the complainant, George Hall, Sallie Eberhart, who intermarried with the complainant, John Eberhart, and Carrie Clark, who intermarried with Ernest Clark, deceased, she having died on or about the — day of —, 18—, intestate, leaving the complainant, Edna Clark,  
20        an infant of the age of twelve years, her only heir at law and next of kin surviving her. That the children of the said

Julia\* — Elliott, deceased, are the complainants, Sarah Starnell, a widow, Ida German, who intermarried with the complainant, George German, Mary English, who intermarried with the complainant, James English, Virginia McLane, who intermarried with the complainant, William McLane, Lillie Mills, who intermarried with the complainant, Cary Mills, and John W. Elliott, and that said children are the only heirs at law and next of kin of the said — Elliott, deceased.

5. That the said Susan Turner, deceased, was for a long time previous to the alleged conveyance hereinafter set forth, the owner in

fee simple and possessed of "all that part of original Lot numbered Four (4), in Square numbered Two Hundred and Twenty-seven (227), situate in the City of Washington and District of Columbia, and contained within the following metes and bounds, viz., Beginning for the same at the dividing line on North "D" Street, between lots numbered five (5) and four (4) in said Square, and running thence north along the said dividing line ninety-five (95) feet, three (3) inches, to the rear of said lot; thence eastwardly along the rear line of said lot thirteen (13) feet, eight and one half ( $8\frac{1}{2}$ ) inches; thence southwardly at right angles, parallel to said dividing line between lots numbered five (5) and four (4), ninety-five (95) feet, three (3) inches, to north "D" Street; thence westwardly along the line of said "D" Street, thirteen (13) feet, eight and one-half ( $8\frac{1}{2}$ ) inches, to the dividing line between said lots five (5) and four (4), at the place of beginning; the same comprehending the west one-fourth full part of said lot numbered four (4), in said square, with the use of the alley between said part of said lot and the part adjoining it on the east side, in common to both parcels," the deed of conveyance for said land is duly recorded in J. A. S., number 70, folio 1,

21 *et seq.*, one of the land records of the District of Columbia, a duly certified copy of said deed has been heretofore filed in this cause with the original bill marked Complainant's Exhibit No. 1, and is now prayed to be taken and read with this amended bill of complaint, as a part hereof.

6. That upon the conveyance aforesaid the said Susan Turner entered into possession of the said real estate and occupied the same up to the time of her death, the said premises being improved by a brick dwelling known as No. 1423 D Street, N. W., in the said City of Washington, and that she conducted and carried on the business of a boarding house in the said premises for many years, and until she became incapacitated to conduct business affairs, as hereinafter shown and set forth, and that she derived income and profits from the said business, besides having other money invested in interest bearing securities or loaned out on interest.

7. That the said defendants, Harry J. McGowan and Jesse A. McGowan, are the children of a deceased half sister of the said Susan Turner; that their mother died when they were quite young and that they, with their father after the death of their mother, took up their residence at the home of the said Susan Turner at said premises and they continued to reside on the said premises with the said Susan Turner up to the time of her death.

8. That the said Susan Turner, by a certain paper writing, purporting to be a deed of conveyance, dated on the 29th day of March, 1901, and recorded in the Office of the Recorder of Deeds of the District of Columbia, on the 30th day of March, 1901, in Liber 2554, folio 274, *et seq.*, purported to convey in fee simple to the said defendants, Harry J. McGowan and Jesse A. McGowan, the said real estate mentioned and set forth in the Fifth paragraph of this Bill, for the pretended consideration of Ten Dollars (\$10.00). A duly certified copy of the said paper writing was heretofore filed in this

22 cause with the original bill marked Complainants' Exhibit No. 2, and the same is now prayed to be taken and read with this amended bill of complaint as a part hereof.

9. Complainants aver that the said real estate mentioned in the said fifth paragraph of this bill and in the said pretended deed of conveyance, was all the real estate in and to which the said Susan Turner, deceased, had any right, title or interest, either in law or in equity, during her lifetime, and that the said pretended conveyance thereof to the said defendants, Harry J. McGowan and Jesse A. McGowan, was without any consideration whatsoever, either in law or in equity.

10. That at the time of the conveyance of said piece or parcel of land with the improvements thereon, to the said defendants Harry J. McGowan and Jesse A. McGowan, the said Susan Turner was, and for long time prior thereto had become, by reason of old age she being upwards of eighty-three years of age, and physical weakness resulting therefrom, and bodily infirmities produced by paralysis, and other diseases or complaints, a person of extreme mental weakness and loss of memory, and was incapacitated thereby from understanding the nature of any acts or deed by her done or performed or attempted to be done or performed, requiring the exercise of judgment or discretion; and although she could formerly read and write yet at the time of the pretended conveyance herein set forth, she was physically and mentally incapacitated from writing her name, and for some years prior thereto she was an invalid and endured much suffering; having had several strokes of paralysis and she was thereby made unable to walk and required the care and attention of an infant of tender years, that her mental condition was so impaired that she failed to remember and recognize her own relatives; her speech was affected by the ailments from which she suffered, and her conversation became and was incoherent produced by mental weakness and loss of memory, and that at the time of the pretended execution of the said pretended deed of conveyance by her  
23 to the said defendants and for a long time prior thereto, she was of unsound mind, and to such a degree of unsoundness that she was incapable of executing a valid deed or contract, or of understanding the terms, nature or effect of any deed or contract.

11. That the said defendant-, Harry J. McGowan and Jesse A. McGowan, by reason of their long continued residence at the home of the said Susan Turner, had acquired great control and influence over her, and being young men of intelligence and business capacity, were at the time of the alleged making and execution of the said paper, and for a long time prior thereto, had been acting in a fiduciary and confidential capacity for the said Susan Turner, attending to, and controlling by reason of her said incapacity, all of her business matters and affairs, and that she reposed implicit confidence in them to the extent that she was capable of entertaining feelings of confidence in another, and such relations between them continued down to and including the time of the making and execution of the said paper purporting to be the conveyance aforesaid.

12. That the said defendants, Harry J. McGowan and Jesse A.

McGowan, who had resided on said premises with the said Susan Turner, deceased, during the time aforesaid, and were so residing at the time of her death, have by means of her mental weakness and mental unsoundness herein before set forth and of her incapacity and inability to transact and do business knowingly and understandingly or to make and execute any valid deed or contract, and because of their long residence in said house and close association with the said Susan Turner in the fiduciary and confidential relation aforesaid, and the said confidence thereby induced and reposed in them and each of them as aforesaid, acquired an undue influence over the said Susan Turner to an extent sufficient to completely dominate and control her and to prevent any true consent by her to any act or deed done or performed by her, and that because of said undue influence

24 and pressure brought to bear upon her, and of her condition, mental and physical, and of the threats and importunities of the said defendants, which the said Susan Turner had not the power to resist for the reason aforesaid, and because of the presence of the defendants who acted for her in the fiduciary and confidential capacity aforesaid, and while she was under duress of the said defendants, they fraudulently and illegally obtained from the said Susan Turner the alleged conveyance to them hereinbefore mentioned and set forth. And the said complainants are informed and believe, and so charge and aver that the said pretended deed was prepared or caused to be prepared by the said Harry J. McGowan and Jesse A. McGowan.

13. Complainants are informed and believe, and so charge the facts to be that the said defendants, after obtaining the said pretended deed from the said Susan Turner, under the circumstances hereinbefore set forth, and at about the time of her death, advertised the said real estate for sale and have so continued to advertise the same, and have endeavored and are endeavoring to sell the same and to procure the proceeds of said sale in fraud of the just rights of the said complainants, who were without any knowledge or notice of the said paper or of the said fraudulent transaction, and who only acquired notice thereof shortly before the institution of this suit.

14. Complainants are informed and believe that said defendants are in possession of the said real estate and are exercising acts of ownership thereover,—that said pretended conveyance of record has such an effect upon the title of complainants to the said real estate which descended to them upon the death of the said Susan Turner, that so long as it remains unrescinded the said complainants will be unable to obtain partition of the said real estate.

15. That the value of the said real estate so illegally and fraudu-  
25 lently obtained by the said defendants in manner and form as here-before set forth, and of which the said complainants have been thereby deprived, amounts to the sum of four thousand five hundred dollars, (\$4,500), for which the said defendants, or either of them, paid no consideration of any nature or kind whatsoever.

*Prayers.*

The premises considered, the complainants pray:

1. That process of subpoena may issue in due form and be served upon the said defendants, commanding them and each of them to appear and make full answer to the allegations and statements contained in this Bill, but an answer under oath is hereby expressly waived.

2. That said paper writing purporting to be a deed of conveyance from the said Susan Turner to the said defendants Harry J. McGowan, and Jesse A. McGowan, dated March 29th, 1901, and purporting to convey the real estate mentioned in the fifth paragraph hereof, may be decreed to be delivered up by the last mentioned defendants and filed with the papers in this cause, and that the same may be decreed cancelled and annulled and held to be null and void and of no effect, and that the said real estate therein mentioned may be adjudged to have descended to the said complainants as the heirs at law of the said Susan Turner upon her death.

3. That the said defendants, Harry J. McGowan and Jesse A. McGowan, and each of them, may be enjoined and restrained from advertising for sale or attempting to make or making sale of the said real estate or any portion thereof, mentioned in the fifth paragraph of this bill, and in said Complainant's Exhibit No. 2, filed herewith, and as a part of this Bill, or from mortgaging the same or creating any lien thereon, or upon any part or portion thereof until  
 26      the further order of this Court, and that upon the final hearing of this cause said injunction may be decreed final and perpetual.

4. That a receiver may be appointed in this Honorable Court to take charge of all the real estate of which the said Susan Turner died seized, and to collect the rents, issues and profits thereof during the pendency of this suit.

5. That the said defendants, Harry J. McGowan and Jesse A. McGowan be decreed to render and account of all the rents, issues and profits of the said estate collected by them or either of them, and to pay over the amount of said collections to the receiver when appointed to abide the decision of this cause.

6. That the complainants may have such other and further and general relief in the premises as the nature of their case may require, and to the Court may seem proper.

The defendants to this Bill of Complaint are Harry J. McGowan and Jesse A. McGowan.

JOHN H. SIMMS.

CHARLES BENDHEIM AND  
 EDMUND BURKE,

*Solicitors for Complainants Except Ida German  
 and George German.*

FRANK C. ANDERSON,

*For Ida & George German,*

*Solicitors for Complainants.*

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing Bill of Complaint by me subscribed and know the contents thereof; and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

JOHN H. SIMMS.

Subscribed and sworn to before me this 17th day of February, A. D. 1903.

J. R. YOUNG, *Cl'k*, &c.,  
By R. J. MEIGS, JR., *Ass't Cl'k*.

27 *Demurrer to Amended Bill.*

Filed February 26, 1903.

In the Supreme Court of the District of Columbia.

In Equity. No. 23267.

ELLA ELROY ET AL., Complainants,  
*vs.*  
HARRY J. MCGOWAN ET AL., Defendants.

The defendants say that the complainants have not stated in their amended bill of complaint filed herein such a case as entitles them to the relief therein prayed, or to any other relief against the defendants.

Wherefore, the defendants pray the judgment of this Honorable Court whether they shall make further answer to the said amended bill of complaint. And they pray to be hence dismissed with their costs in this behalf sustained.

HARRY J. MCGOWAN.  
JESSE A. MCGOWAN.

CHAS. T. HENDLER,  
*Solicitor for Defendants.*

Harry J. McGowan, being duly sworn, deposes and says that he is one of the defendants in the foregoing demurrer, and that the same is not interposed for delay.

HARRY J. MCGOWAN.

Subscribed and sworn to before me this 25 day of February, A. D. 1903.

[SEAL.]

L. MURRAY GOTWALD,  
*Notary Public, D. C.*

I hereby certify that, in my opinion, the foregoing demurrer is well founded in law and proper to be filed.

CHAS. T. HENDLER,  
*Solicitor for Defendants.*

*Decree Overruling Demurrer.*

Filed April 28, 1903.

In the Supreme Court of the District of Columbia.

Equity. No. 23267, Docket No. 50.

ELLA ELROY ET ALS.

vs.

H. J. MCGOWAN ET AL.

This cause *coming* on to be heard on the demurrer filed by the defendants, Harry J. McGowan and Jesse A. McGowan to the amended bill of complaint, and was argued by counsel, upon consideration whereof it is by the Court on this 28th day of April, A. D. 1903, adjudged, ordered, and decreed that the said demurrer be and the same is hereby overruled. On motion of the said defendants leave is hereby granted them to plead to or answer said amended bill within twenty days from the date hereof.

By the Court:

A. B. HAGNER, *Justice.**Answer to Amended Bill.*

Filed May 16, 1903.

In the Supreme Court of the District of Columbia.

Equity. No. 23267.

ELLA ELROY ET AL., Complainants,

vs.

HARRY J. MCGOWAN ET AL., Defendants.

The Joint and Several Answer of Harry J. McGowan and Jesse A. McGowan to the Amended Bill of Complaint.

To the Honorable the Justice of the Supreme Court of the District of Columbia, Holding a Special Term for Equity Business:

Your respondents, Harry J. McGowan and Jesse A. McGowan, now, and at all times hereafter, saving and reserving to themselves all and all manner of benefit of exception which may be had or taken to the manifold errors, uncertainties, imperfections, and insufficiencies of the amended bill of complaint in the above-entitled cause, for answer thereto, or to so much as they are advised it is necessary or material to make answer to, answering, say:

*First.* Being unacquainted with most of the parties mentioned therein, they can neither admit nor deny the statements contained

in the first paragraph, and so leave the complainants to make strict proof thereof.

*Second.* They admit that they are residents of the District of Columbia.

30     *Third.* They can not answer, because they are not advised, as to the heirship of the complainants; and they therefore leave them to make due and strict proof thereof. They admit that Susan Turner died without leaving husband or children surviving her. The statement that she died in December, 1901, is not true. She died on January 11, 1902. The averment that the said Susan Turner died intestate is also not true. She left a last will and testament dated the 17th day of January, 1901.

*Fourth.* They can not answer as to the fourth paragraph, because they have no knowledge of the facts therein stated; and they therefore leave the complainants to make due and strict proof thereof. They are advised and believe that Noble Simms, deceased, in addition to the children therein named, died leaving a son named William Simms surviving him.

*Fifth.* They admit that the property described in the fifth paragraph was acquired by the deed of conveyance therein mentioned, a certified copy of which said deed is filed as Exhibit No. 1 with the original bill.

*Sixth.* They admit that Susan Turner, deceased, entered into possession of the said real estate, and also that for some time she conducted a boarding house at the said premises; but they aver that, instead of deriving profits therefrom, the said business was in fact a source of loss to the said Susan Turner, deceased. As to the last statement in the sixth paragraph, that the said Susan Turner, deceased, had "other money invested in interest-bearing securities or loaned out on interest," the said respondents have knowledge of only one note for five hundred dollars (\$500).

*Seventh.* They admit that the statements in the seventh paragraph are true, except that the respondent Harry J. McGowan did not reside with his aunt, the said Susan Turner, deceased, from July 1, 1894, to April 15, 1899; that on the latter date, at the earnest solicitation and entreaty of his said aunt and much against  
31     his will (because of the fact that the neighborhood was a very undesirable one to which to take his family), he and his wife, with their two small children, went to reside with her and continued so to reside with her until her death; and that during all of this time the wife of the said respondent Harry J. McGowan, as affectionately as though she were a daughter, ministered to the wants of the said aunt. Your respondent Jesse A. McGowan continued to reside with his said aunt at her earnest entreaty, and thereby was compelled to forego advantageous employment which was offered to him.

*Eighth.* In answer to the eighth paragraph they state that on the 29th day of March, 1901, the said Susan Turner, deceased, did execute a deed of conveyance of the said real estate, and that the said deed was duly recorded as set out in the said paragraph.

*Ninth.* They are informed and believe, and therefore aver, that

the said Susan Turner, deceased, was, during her lifetime, possessed of real estate other than that which is the subject of this suit, and that it was disposed of during her life. And they also aver that there was a good and sufficient consideration for the said conveyance to them in the natural love and affection that existed between them and their said deceased aunt.

*Tenth.* While it is true that some time before the execution of the said deed of conveyance the said Susan Turner, deceased, had suffered a stroke of partial paralysis, yet it is not true that her mind was thereby impaired. They are informed and believe, and therefore aver, that their said deceased aunt was much less than eighty-three years of age at the time of the execution of the said deed of conveyance. Your respondents aver that she was fully competent to execute a valid conveyance of her property. It is true that, in

consequence of the partial paralysis, she could not write;  
32 but your said respondents are informed and believe that, in order to make a valid conveyance, it was not necessary that she should sign her name. If at any time she failed to recognize any of her relatives, such failure was due to the fact that the visits to her of such relatives were so infrequent as to preclude the possibility of recognition on her part. Some of the people whose names appear as complainants herein and who claim relationship to her have never been seen at her home. She never failed to recognize your said respondents or any of her friends. Her speech was somewhat affected by the said partial paralysis; but at no time was her conversation incoherent. It is absolutely untrue that the said Susan Turner, deceased, was at any time of unsound mind; and it is equally untrue that she did not understand the full import and effect of the said deed of conveyance.

*Eleventh.* In answer to the eleventh paragraph your respondents state that the relations that existed between them and their said deceased aunt were of a most affectionate nature, and that the only influence exerted was that which is unconsciously exerted by love and affection. They deny that any fiduciary relation of any character whatever existed at any time between them and their said deceased aunt; and they also deny that there were any business matters of their said aunt which required their attention or control.

*Twelfth.* Your respondents, having heretofore answered in regard to the mental capacity of their said deceased aunt and having denied the existence of fiduciary relations on their part toward her, are informed and believe that it is not necessary to answer further as to those matters. They deny that they exerted any undue influence on their said deceased aunt, and they also deny that the said conveyance was fraudulently or illegally obtained from her, and they aver that the only influence exerted on her were the love, care, and attention always bestowed on her by them during their lives.

33 They also aver that the said conveyance was the free, voluntary, and intelligent act of their said deceased aunt; that it was made in pursuance of her repeatedly declared intention so to do; and that the deed was prepared at her special request.

*Thirteenth.* Your respondents did advertise the said property for

sale. They aver that this was done without any thought of the said complainants; they believed then that they had a clear and perfect title to the said property—as they aver they have at present—and were entitled to dispose of it as they saw fit, without let or hindrance from anyone. They also aver that the effort to dispose of the said real estate was not in fraud of any rights of the said complainants or of anyone else.

*Fourteenth.* Your respondents admit that they are in possession of the said real estate and exercising rights of ownership over it, as, they aver, they have a right to do. They deny that the said real estate descended to the said complainants, or that they, the said complainants, have any interest therein.

*Fifteenth.* Your respondents have already fully and explicitly denied that there was any fraud or illegality in the said transaction. They are not informed as to the exact value of the said real estate; but they believe, and therefore aver, that the value set out in the said amended bill is largely in excess of its real market value. They again aver that there was good and sufficient consideration therefor.

Your respondents, having thus fully, fairly, and freely answered the said amended bill, pray that the said bill be dismissed, and that they be allowed their costs in this behalf most wrongfully sustained.

HARRY J. MCGOWAN.

JESSE A. MCGOWAN.

CHAS. T. HENDLER,

*Solicitor for Defendants.*

34 We and each of us do solemnly swear that we have read the foregoing answer by us subscribed, and know the contents thereof, and that the facts therein stated upon our personal knowledge are true, and those stated upon information and belief we believe to be true.

HARRY J. MCGOWAN.

JESSE A. MCGOWAN.

Subscribed and sworn to before me this 15th day of May, A. D. 1903.

[SEAL.]

JAMES F. BUNDY,  
*Notary Public, D. C.*

35 *Joinder of Issue.*

Filed June 6, 1903.

In the Supreme Court of the District of Columbia.

Equity. No. 23267.

ELLA ELROY ET AL., Complainants,

*vs.*

HARRY J. MCGOWAN ET AL., Defendants.

The complainants join issue upon the answer of the defendants.

CHAS. BENDHEIM,

EDMUND BURKE,

*Solicitors for Complainants.*

Service acknowledged this 6th day of June A. D. 1902.

CHAS. T. HENDLER,  
*Solicitor for Defendants.*

*Decree.*

Filed February 10, 1905.

In the Supreme Court of the District of Columbia.

Equity. No. 23267, Docket No. 52.

ELLA ELROY ET ALS., Complainants,

*vs.*

HARRY J. MCGOWAN & JESSE A. MCGOWAN, Defendants.

This cause came on to be heard and was argued by counsel for the respective parties, and thereupon on consideration thereof it is by the Court on this 10th day of February, A. D., 1905, adjudged, ordered and decreed as follows, viz:

First, that the deed of Conveyance described in the pleadings from Susan Turner, widow, to Harry J. McGowan and Jesse A. McGowan, dated the 29th day of March A. D., 1901, and recorded in the liber No. 2554, folio 274 *et seq.*, one of the land records of the District of Columbia purporting to convey to said Harry J. and Jesse A. McGowan and their heirs and assigns, "the following described land and premises, with the improvements, easements and appurtenances thereunto belonging, situate and being in the City of Washington, in the said District of Columbia namely: All that part of Original Lot numbered Four (4) in Square numbered Two hundred and twenty seven (227) contained within the following metes and bounds, viz: Beginning for the same at the dividing line on North D Street between Lot numbered Five (5) and Four (4) in said square and running thence North along said dividing line Ninety-five (95) feet Three (3) inches to the rear of said lot, thence Eastwardly along the rear line of said Lot, Thirteen (13) feet, eight and one-half ( $8\frac{1}{2}$ ) inches; thence Southerly at right angles, parallel to said dividing line between Lots numbered Five (5) and Four (4), ninety-five (95) feet Three inches to North D Street, thence

Westwardly along the line of said D Street, Thirteen (13) feet, Eight and one half ( $8\frac{1}{2}$ ) inches to the dividing line between said Lots numbered Five (5) and Four (4) at the place of beginning the same comprehending the West one-fourth full part of said Lot numbered Four (4) in said square, with the use of the alley between said part of said Lot, and the part adjoining it on the East side, in, common to both parcels," was at the time of its execution and is null and void and of no effect both in law and in equity and that the said deed of conveyance be, and the same is, hereby vacated, set aside, annulled and cancelled.

(The following paragraph was in the decree as submitted to the Court for signature, but was stricken out by the Court before signing.)

[Second, that the said real estate together with the improvements easements and appurtenances thereunto belonging mentioned set forth and described by metes and bounds as aforesaid upon the death of the said Susan Turner, to wit, on the 11th day of January, 1902, descended to the heirs at law of the said Susan Turner, deceased, who are parties to the bill of complaint filed in this cause.]\*

Second

[Third],\* that such of the said complainants as are heirs at law of the said Susan Turner, deceased, have possession of the said real estate with the improvements, easements and appurtenances thereunto belonging and that the said defendants Harry J. McGowan and Jesse A. McGowan do and shall forthwith vacate, and surrender yield up and deliver to the said heirs at law of the said Susan Turner, deceased, parties complainants to the bill filed in this cause, the possession of the said real estate and improvements and easements and appurtenances thereunto belonging, mentioned described and set forth in the said bill of complaint and in the first paragraph of this decree.

38 Third, that the said complainants have leave to cause this decree or a duly certified copy thereof to be recorded by the Recorder of Deeds amongst the Land Records of the District of Columbia.

Fourth, that this cause be referred to the auditor of this Court with instructions to ascertain and report to the Court such sum of money as will compensate the said heirs at law of the said Susan Turner, deceased, for the use and occupation by the said defendants of the said real estate and improvements from the date of the death of the said Susan Turner, to wit, the 11th day of January, 1902, up to and until the date of this decree.

Fifth, that the complainants herein recover of the said defendants the costs of this suit to be taxed by the clerk and that the said complainants have execution thereof as at law.

THOS. H. ANDERSON, *Justice*.

Appeal noted in open Court. Bond fixed at one hundred dollars.

39 *Petition for Rehearing.*

Filed February 16, 1905.

In the Supreme Court of the District of Columbia.

Equity. No. 23267.

ELLA ELROY ET AL., Complainants,

vs.

HARRY J. MCGOWAN ET AL., Defendants.

The petition of Harry J. McGowan and Jesse A. McGowan, by their solicitors, J. J. Darlington and Charles T. Hendler, respectfully represents:

*First.* That by the decree of this Honorable Court signed on the 10th day of February, 1905, it was decreed, among other things, that possession of the real estate therein described be given to the said complainants, and that the said defendants account to the said complainants for the rents, issues, and profits of the said real estate since January 11, 1902, the date of the death of Susan Turner, deceased.

*Second.* That the record in this cause shows that there is on file in the Office of the Register of Wills for the District of Columbia a paper writing purporting to be the last will and testament of the said Susan Turner, deceased, in which the property described in the bill is devised to the defendants as sole devisees.

*Third.* That this Equity Court is without jurisdiction to determine whether the said paper writing is or is not the last will and testament of the said decedent, the Probate Court having exclusive jurisdiction in regard thereto.

*Fourth.* That if the said defendants shall be required to yield possession of the said real estate and account to the said complainants, as provided in the said decree of this Honorable Court, and if the said paper writing be sustained in the Probate Court as the last will and testament of Susan Turner, deceased, the effect of the said decree would be to have the report of the Auditor, affirmed by this Court, stand as a judgment against the said defendants as to their ownership of the said property, whereas by the judgment of this Court in its Probate branch these defendants would be the sole and absolute owners of that property; and under the decree of this Court, on this the equity side thereof, the complainants would be awarded the rents and profits of the said property; while under the judgment of this Court on its Probate side the defendants would be entitled to the said rents and profits, and the complainants would be without any right or title thereto.

*Fifth.* That a petition for the probate of said paper writing has been filed in the Probate Court.

Your petitioners therefore respectfully pray a rehearing on the question as to the jurisdiction of the Court to sign a decree in the form of the said decree, and as to modifying the said decree by striking out so much thereof as decrees possession of the said real estate to the said complainants and that the said defendants account for the rents, issues, and profits thereof, and that upon said rehearing the said decree may be so modified, or else suspended as the final action of this Court in that regard until there shall have been a judgment by the Probate Court, which is vested by law with sole and exclusive jurisdiction thereof, upon the question of the validity of the said last will and testament.

CHAS. T. HENDLER,  
J. J. DARLINGTON,  
*Solicitors for Defendants.*

41 To Messrs. Charles Bendheim, Edmund Burke, Solicitors for Complainants:

Take notice that we shall call the above petition to the attention of Mr. Justice Anderson in Equity Court, Division No. 1, on Friday,

the 24th instant, at ten o'clock a. m. or as soon thereafter as counsel can be heard.

CHAS. T. HENDLER,  
J. J. DARLINGTON,  
*Solicitors for Defendants.*

Service of a copy of the foregoing petition and notice acknowledged this 16th day of February, 1905.

DAVID ROTHSCHILD,  
For CHAS. BENDHEIM,  
*Solicitors for Complainants.*

42

*Decree.*

Filed March 24, 1905.

In the Supreme Court of the District of Columbia.

Equity. No. 23267.

ELLA ELROY ET AL.

vs.

HARRY J. MCGOWAN ET AL.

This cause came on again to be heard, upon the petition of the defendants for a rehearing of the decree entered herein on the 10th day of February, A. D., 1905, and was argued by counsel, and duly submitted to the Court.

On consideration whereof, it is by the Court on this 24th day of March, A. D. 1905, adjudged, ordered, and decreed, that the petition be, and the same is, hereby, overruled and dismissed, and the defendants do pay the costs of this proceeding.

THOS. H. ANDERSON, *Justice.*

Appeal is again noted by counsel for defendants in open Court, and bond for costs to remain fixed as heretofore at one hundred dollars (\$100).

THOS. H. ANDERSON, *Justice.*

*Petition for Leave to File Bill of Review.*

Filed April 23, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 23267.

ELLA ELROY ET AL., Complainants,

vs.

HARRY J. MCGOWAN ET AL., Defendants.

*Petition for Leave to File Bill of Review.*

To the Honorable the Justice of the Supreme Court of the District of Columbia Holding a Special Term for Equity Business:

Your petitioners, Harry J. McGowan and Jesse A. McGowan, file this, their petition for leave to file a Bill of Review, and respectfully state:

1. That they are citizens of the United States and residents of the District of Columbia.

2. That on the 17th day of January, 1901, Susan Turner, then and until her death a resident of the District of Columbia, executed a paper writing purporting to be her last will and testament, a true copy of which paper writing is as follows:

“WASHINGTON, D. C., *January* 17, 1901.

“I Susan Turner do hereby bequeath to my nephews H. J. and J. A. McGowan my house and lot, situated in square number two hundred and twenty seven and known as part of lot number four in the District of Columbia, together with all other real-estate and personal property I possess, my nephew H. J. McGowan to be  
44 executor.

her  
“SUSAN x TURNER.  
mark.

“Witnesses:

MICHAEL HAYDEN.  
HARRY T. LEACH.  
JAMES D. STONER.”

that on the 29th day of March, 1901, the said Susan Turner executed a deed of conveyance, by which she purported to convey to your petitioners in fee simple certain real estate in the District of Columbia, described as follows: “All that part of original lot numbered four (4), in square numbered two hundred and twenty-seven (227), situate in the City of Washington and District of Columbia, and contained within the following metes and bounds, viz., Beginning for the same at the dividing line on North “D” Street, between lots numbered five (5) and four (4) in said square, and running thence north along said dividing line ninety-five (95) feet three (3)

inches, to the rear of said lot; thence eastwardly along the rear line of said lot thirteen (13) feet eight and one-half ( $8\frac{1}{2}$ ) inches; thence southerly at right angles, parallel to said dividing line between lots numbered five (5) and four (4), ninety-five (95) feet three (3) inches, to North "D" Street; thence westwardly along the line of said "D" Street, thirteen (13) feet eight and one-half ( $8\frac{1}{2}$ ) inches, to the dividing line between said lots five (5) and four (4), at the place of beginning; the same comprehending the west one-fourth full part of said lot numbered four (4), in said square, with the use of the alley between said part of said lot and the part adjoining it on the east side, in common to both parcels;" that said real estate was all of the real estate of which said Susan Turner was seized; that the assessed value of said real estate is two thousand four hundred and thirty-four dollars (\$2,434); that said deed of conveyance was recorded in the office of the Recorder of Deeds  
45 for the District of Columbia on the 30th day of March, 1901, in Liber 2554, at folio 274 *et seq.*, one of the land records of the District of Columbia; that said Susan Turner died on the 11th day of January, 1902; and that from the date of the death of said Susan Turner until about the 1st day of June, 1905, your petitioners were in possession of said real estate.

3. That on the 6th day of February, 1902, the said paper writing purporting to be the last will and testament of said Susan Turner was filed in the Office of the Register of Wills for the District of Columbia.

4. That on the 19th day of April, 1902, the original bill was filed in this Equity cause (No. 23267), in which Ella Elroy, John H. Simms, Annie Gill and John Gill (her husband), Harry Simms, William Simms, Lillie Hall and George Hall (her husband), Sallie Eberhart and John Eberhart (her husband), Edna Clark (an infant, by her next friend, John H. Simms), Sarah Starnell, Ida German and George German (her husband), Mary English and James English (her husband), John W. Elliott, Virginia McLane and William McLane (her husband), and Lillie Mills and Cary Mills (her husband) were named as complainants and your petitioners and Charles A. Hefferman were named as defendants.

5. That said original bill alleged, among other things, that said Susan Turner, at the time of executing said deed of conveyance, was mentally incompetent to make a valid deed or contract, and that the execution of said instrument was procured by your petitioners by fraud and undue influence; that said original bill also alleged that said paper writing purporting to be the last will and testament of said Susan Turner was executed at a time when she was not of sound and disposing mind and capable of making a valid deed or contract, and was obtained by fraud and undue influence on the part of your  
46 petitioners; that said original bill prayed that said paper writing purporting to be a deed of conveyance be decreed to be canceled and held to be null and void, that said paper writing purporting to be the last will and testament be decreed to be not her last will and testament, that your petitioners be restrained from disposing of — incumbering said real estate and from offering said

paper purporting to be the last will and testament of said Susan Turner for probate and record, that a receiver be appointed, and that your petitioners be required to account for the rents, issues, and profits of said real estate.

6. That your petitioners entered their appearance in said cause on the 28th day of April, 1902, and filed a demurrer to said original bill on the 29th day of July, 1902; that thereafter said cause came on for hearing on said demurrer, and on the 2d day of February, 1903, said demurrer was sustained on the ground of multifariousness because exclusive jurisdiction as to wills is vested in the Probate Court, with leave to the complainants to amend their bill of complaint as advised.

7. That on the 17th day of February, 1903, said complainants filed an amended bill of complaint in said cause; that in said amended bill your petitioners were the only persons named as defendants; that the allegations in said amended bill of complaint were practically the same as those in said original bill, except that it was alleged in the third paragraph thereof that said Susan Turner died intestate, and all references to said paper writing purporting to be the last will and testament of said Susan Turner were omitted therefrom; that said amended bill of complaint prayed for the same relief, in effect, as that prayed for in the original bill of complaint, except that no relief was asked for in regard to said paper writing purporting to be the last will and testaemnt of said Susan Turner.

8. That on the 26th day of February, 1903, your petition-  
47       ers filed a demurrer to said amended bill of complaint; that on the 28th day of April, 1903, said demurrer was overruled, with leave to your petitioners to answer; that on the 16th day of May, 1903, your petitioners filed their answer to said amended bill, in which they denied that said Susan Turner was mentally incompetent to make a valid deed or contract, that said instrument was obtained by undue influence or fraud, and in which they denied that said Susan Turner died intestate and asserted that she left a last will and testament dated January 17, 1901.

9. That thereafter said complainants filed a replication to said answer, and issue was joined, and testimony was taken, and a certified copy of said paper writing purporting to be the last will and testament of said Susan Turner was offered and placed in evidence; that no receiver was ever appointed, and no restraining order was ever issued.

10. That thereafter the said cause came on for hearing on the pleadings, the testimony, and the exhibits, and on the 10th of February, 1905, a decree was signed, by which it was adjudged, ordered and decreed as follows: That the deed of conveyance from Susan Turner to your petitioners was at the time of its execution null and void and of no effect both in law and equity, and that the said deed of conveyance be and the same is hereby vacated, set aside, annulled and canceled; that your petitioners yield up and deliver possession of the said real estate to such of the said complainants as are heirs at law of said Susan Turner; that said complainants have leave to cause a copy of said decree to be recorded in the Office of the

Recorder of Deeds for the District of Columbia; that said cause be referred to the Auditor of this Court to ascertain and report to the Court such sum of money as will compensate said heirs at law for the use and occupation of said real estate from the date of the death of said Susan Turner up to and until the date of said decree; and that said complainants recover of your petitioners the costs of said suit, to be taxed by the Clerk, and that said complainants have execution thereof as at law.

48 11. That on the 16th day of February, 1905, your petitioner Harry J. McGowan, as the Executor named in said paper writing bearing date on the 17th day of January, 1901, filed a petition in the Probate Court praying that said paper writing be admitted to probate and record as the last will and testament of said Susan Turner, deceased, and that letters testamentary thereunder be issued to him; and that your petitioner Jesse A. McGowan consented to the granting of the prayers of said petition.

12. That on the same day, to wit, on February 16, 1905, your petitioners, by their solicitors, filed in said Equity cause a petition for a rehearing; that said petition called attention to the possibility of the very condition arising in regard to said real estate which, as will hereafter appear, now exists; that said petition prayed that on said rehearing the said decree might be modified by striking out so much thereof as decreed possession of said real estate to said complainants and that your petitioners account for the rents, issues, and profits thereof, or else be suspended as the final action of the Court in that regard until there should have been a judgment of the Probate Court, which is vested by law with sole and exclusive jurisdiction thereof, upon the question of the validity of said last will and testament.

13. That on March 24, 1905, said petition was overruled and a rehearing denied.

49 14. That an appeal was noted in open court on behalf of your petitioners; that your petitioners were informed by an estimate of the Clerk that it would cost about nine hundred dollars (\$900) to take up and print the record in said Equity cause in the Court of Appeals; that your petitioners' attorney sought to have the attorneys for said complainants consent to take up to the Court of Appeals certain parts of said record, in order to have certain questions of law decided by said Court, but the attorneys for said complainants insisted that the whole record go up; and that your petitioners were wholly without means to prosecute said appeal.

15. That thereafter said appeal was docketed and dismissed in the Court of Appeals by said attorneys for said complainants, and on the 14th day of June, 1905, a writ of assistance was issued out of this Court and said complainants put in possession of said real estate.

16. That your petitioners vacated said premises, on the demand of the attorneys for said complainants, on or about the 1st day of June, 1905, and left in the house a lot of personal property that was part of the personal estate of said Susan Turner, deceased; that the key to said premises was turned over to your petitioners' attorney, who began proceedings to have a collector appointed to take charge

of the personal estate of said decedent; that Leonard J. Mather, Esq., was appointed such collector and qualified on the 15th day of June, 1905, and has since had possession of the entire personal estate of said decedent.

17. That on the 26th day of June, 1905, a caveat was filed in the Probate Court on behalf of a number of said complainants, contesting the validity of said paper writing purporting to be the last will and testament of said Susan Turner.

18. That on the 28th day of July, 1905, an order was passed in the Probate Court framing issues to be tried by a jury; that  
50 said issues so framed were as follows:

"1. Was the paper writing propounded as the last will and testament of Susan Turner, deceased, bearing date the 17th day of January, 1901, executed by her in due form of law?

"2. Was the said Susan Turner, at the time of executing the said paper writing, of sound and disposing mind and capable of executing a valid deed or contract?

"3. Was the execution of the said instrument by the said Susan Turner procured by the fraud of Harry J. McGowan and Jesse A. McGowan, or either of them, or of any other person or persons?

"4. Was the execution of said instrument by said Susan Turner procured by the undue influence of said Harry J. McGowan and Jesse A. McGowan, or either of them, or of any other person or persons?"

and that on the 8th day of February, 1906, appearance was entered in said cause in the Probate Court for all the next of kin and heirs at law of said Susan Turner, deceased, except your petitioners, who were already in Court and asking that the said paper writing be admitted to probate and record as the last will and testament of said Susan Turner, deceased.

19. That on the 8th day of March, 1906, said cause came on for trial before Mr. Justice Barnard and a jury, and on the 20th day of March, 1906, said jury returned a verdict sustaining said will.

20. That on the 23d day of April, 1906, an order was signed admitting said paper writing to probate and record as the last will and testament of real and personal property of the said Susan Turner, deceased, a true copy of which said order is attached hereto and is prayed to be read as a part of this petition.

21. That by virtue of said judgment of this Honorable Court, in its Probate branch, your petitioners are, and have been since the date of the death of said Susan Turner, the sole and absolute owners of the aforesaid real estate, and the said complainants have  
51 not now and never did have any right, title, or interest therein; but that by reason of the decree aforesaid, dated the 10th day of February, 1905, said complainants are now, and have been since the 14th day of June, 1905, in possession of said real estate and collecting the rents, issues, and profits thereof.

22. That your petitioners have never been called upon to account before the Auditor for the rents, issues, and profits of said estate under the aforesaid decree of this Honorable Court; that your peti-

tioners are wholly without means, and have no possible way to raise a sufficient amount, to pay the taxable costs in said Equity cause.

23. Your petitioners are informed and believe, and therefore aver, that all of said complainants, except John H. Simms, are non-residents and that all of them are impecunious; so that it would not be possible for your petitioners to recover from said complainants any of the rents, issues, and profits of said real estate they might hereafter collect.

24. That your petitioners also insist that said decree of February 10, 1905, is erroneous and ought to be reviewed, reversed, and set aside for error apparent on the record, inasmuch as it appears from the record that, even if said complainants ever had any rights in the premises—which it has, since the signing and enrolling of said decree, been conclusively demonstrated they never did have—they had a plain, adequate, and complete remedy at law.

Wherefore, the premises considered, your petitioners respectfully pray:

1. That a decree may be passed by this Honorable Court, granting your petitioners leave to file a Bill of Review, to the end that said decree of the 10th day of February, 1905, may be reviewed and reversed (especially in so far as it decreed possession of said  
52 real estate to said complainants, and that your petitioners account for the rents, issues, and profits thereof, and that your petitioners pay the costs of said proceeding), and your petitioners placed in the same situation in which they would have been if said decree had not been signed.

2. That said complainants, and each of them, and their and each of their assigns, agents, attorneys, and representatives, be enjoined and restrained from doing anything further, or causing anything further to be done, to carry into effect the said decree pending action of this Honorable Court on said Bill of Review.

3. That a receiver be appointed by this Honorable Court to take charge of said real estate, and to collect the rents, issues, and profits thereof and preserve them pending the action of the Court on said Bill of Review.

4. That a rule to show cause may be issued by this Honorable Court, directed to the aforesaid Ella Elroy, John H. Simms, Annie Gill, Harry Simms, William Simms, Lillie Hall, Sallie Eberhart, Edna Clark (an infant), Sarah Starnell, Ida German, Mary English, John W. Elliott, Virginia McLane, and Millie Mills, requiring them, and each of them, to appear in this Court on or before a day certain, to be therein named, and show cause, if any they have, why your petitioners should not be granted the relief herein prayed.

5. That your petitioners be granted such other and further relief as to the Court shall seem meet and proper and the nature of the case may require.

HARRY J. MCGOWAN.  
JESSE A. MCGOWAN.

CHAS. T. HENDLER,  
*Solicitor for Petitioners.*

53 DISTRICT OF COLUMBIA, ss:

We and each of us do solemnly swear that we have read the foregoing petition by us subscribed, and know the contents thereof; that the things therein stated upon our personal knowledge are true; and that those stated upon information and belief are believed to be true.

HARRY J. MCGOWAN.  
JESSE A. MCGOWAN.

Subscribed and sworn to before me this 23d day of April A. D. 1906.

[SEAL.]

AGNES LEE EICHBORN,  
*Notary Public, 602 3rd St. N. W., Washington, D. C.*

54 In the Supreme Court of the District of Columbia, Holding  
a Probate Court.

*In re* Estate of SUSAN TURNER, Deceased. No. 12723, Adm. Doc. 33.

Upon motion of counsel for the caveatees in this case, and upon consideration of the prior proceedings had herein, including the verdict of the jury impaneled to try the issues framed in the case, and after hearing counsel for the caveators, it is, this 23d day of April, A. D. 1906, adjudged, ordered, and decreed as follows:

*First.* That the paper writing propounded as the last will and testament of Susan Turner, deceased, bearing date the 17th day of January, 1901, was executed by her in due form of law.

*Second.* That the said Susan Turner, at the time of executing the said paper writing, was of sound and disposing mind and capable of executing a valid deed or contract.

*Third.* That the execution of the said instrument by the said Susan Turner was not procured by the fraud of Harry J. McGowan and Jesse A. McGowan, or of either of them, or of any other person or persons.

*Fourth.* That the execution of said instrument by said Susan Turner was not procured by the undue influence of said Harry J. McGowan and Jesse A. McGowan, or either of them, or of any other person or persons.

55 *Fifth.* That the said paper writing be, and it hereby is, admitted  
to probate and record in this Court as the last will and testa-  
ment of real and personal estate of the said Susan Turner,  
deceased.

*Sixth.* And it is further ordered that letters testamentary be issued accordingly to Harry J. McGowan, named as Executor therein, upon his filing bond in the sum of five hundred dollars, with surety or sureties approved by the Court, conditioned for the faithful performance of his duties as such Executor.

*Seventh.* It is further ordered that the caveatees in this case recover against the caveators their proper costs to be duly taxed, and that they have execution thereof as at law.

WENDELL P. STAFFORD,  
*Associate Justice.*

56

*Rule to Show Cause.*

Filed April 23, 1906.

In the Supreme Court of the District of Columbia.

Eq. No. 23267, Doc. 52.

ELLA ELROY ET AL., Complainants,

*vs.*

HARRY J. MCGOWAN ET AL., Defendants.

Upon consideration of the petition of Harry J. McGowan and Jesse A. McGowan, filed in the above-entitled cause, praying for leave to file a Bill of Review, for a temporary injunction, and for a receiver *pendent-lite*, it is this 23d day of April, A. D. 1906, Ordered that Ella Elroy, John H. Simms, Annie Gill, Harry Simms, William Simms, Lillie Hall, Sallie Eberhart, Edna Clark (an infant), Sarah Starnell, Ida German, Mary English, John W. Elliott, Virginia McLane, and Lillie Mills appear in this Court, on the 27th day of April, 1906, at ten o'clock A. M., and show cause, if any they have, why the prayers of said petition should not be granted: Provided, a copy of said petition, together with a copy of this rule to show cause, be served on them, or their attorneys of record in said Equity Cause No. 23267, on or before the 24th day of April, 1906.

By the Court:

WENDELL P. STAFFORD,  
*Associate Justice.*

57

*Demurrer.*

Filed April 27, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 23267.

ELLA ELROY ET AL., Complainants,

*vs.*

HARRY J. MCGOWAN ET AL., Respondents.

These respondents, not confessing or acknowledging any or all the matters in said rule to show cause and petition filed in support thereof to be true in manner and form therein stated, do demur to the same and for cause of demurrer thereto shows:

That the said petitioners have not in and by their said rule to show cause and petition filed in support thereof shown or stated such a case as entitles them to the relief therein prayed and leave to the Court to file the bill of review therein sought.

Wherefore they submit to the Court whether they should be compelled or required to make any further or other answer to the said rule to show cause to the petition filed in support thereof, and pray that they may be hence dismissed with their reasonable costs in this behalf sustained.

EDMUND BURKE,  
CHAS. BENDHEIM,  
*Attorneys for Respondents.*

DISTRICT OF COLUMBIA, ss:

58 I, Ida German, one of the respondents, do hereby say on oath that the above demurrer is not interposed for delay.

IDA GERMAN.

Subscribed and sworn to before me this 27th day of April, A. D. 1906.

[SEAL.]

F. EDWARD MITCHELL,  
*Notary Public, D. C.*

I, Charles Bendheim, do certify that in my opinion the above demurrer is well founded in law.

CHAS. BENDHEIM.

*Order Sustaining Demurrer.*

Filed May 4, 1906.

In the Supreme Court of the District of Columbia.

No. 23267, Eq. Doc. 52.

ELLA ELROY ET AL.

vs.

HARRY J. MCGOWAN ET AL.

This cause came on to be heard upon the rule to show cause and the answer thereto by way of demurrer to the petition, and having been argued and duly considered, it is ordered, adjudged and decreed that the demurrer is well taken, and that the rule be discharged with costs to the defendants named in the petition.

WENDELL P. STAFFORD, *Justice.*

59

*Order Allowing Special Appeal.*

Filed May 15, 1906.

Court of Appeals of the District of Columbia, April Term, 1906.

No. 249, Original Docket.

Equity. No. 23267.

HARRY J. MCGOWAN and JESSE A. MCGOWAN, Petitioners,  
*vs.*  
ELLA ELROY, JOHN H. SIMMS, ANNIE GILL and JOHN GILL, Her  
Husband, ET AL.

On consideration of the petition of Harry J. McGowan and Jesse A. McGowan for the allowance of a special appeal from an order of the Supreme Court of the District of Columbia entered herein on the 4th day of May, 1906, it is by the Court now here ordered that said appeal be, and is hereby, allowed.

Per MR. CHIEF JUSTICE SHEPARD.

May 14, 1906.

A true Copy.

Test:

HENRY W. HODGES, [SEAL.]  
*Clerk of the Court of Appeals  
of the District of Columbia.*

60

*Order Fixing Penalty of Appeal Bond.*

Filed May 15, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 23267, Doc. 52.

ELLA ELROY ET AL., Complainants,  
*vs.*

HARRY J. MCGOWAN ET AL., Defendants.

Upon consideration of the order passed in the Court of Appeals of the District of Columbia allowing a special appeal from the order passed herein on the 4th day of May, 1906, it is hereby Ordered that the penalty of the bond for costs on said appeal be fixed at one hundred dollars (\$100.)

By the Court:

WENDELL P. STAFFORD, *Justice.**Memorandum.*

May 16, 1906.—Appeal bond approved and filed.

61 *Directions to Clerk for Preparation of Record.*

Filed May 17, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 23267.

ELLA ELROY ET AL., Complainants,

vs.

HARRY J. MCGOWAN ET AL., Defendants.

The Clerk of said Court will prepare a record on appeal in said cause comprising:

1. Original bill, demurrer thereto, and decree sustaining demurrer.

2. Amended bill, demurrer thereto, and decree overruling demurrer.

3. Answer of defendants and replication.

4. Decree of February 10, 1905.

5. Petition for rehearing and order denying the same.

6. Petition for leave to file bill of review, rule to show cause issued thereon, demurrer thereto, and decree of May 4, 1906, sustaining demurrer.

CHAS. T. HENDLER,  
*Solicitor for Defendants.*

May 17, 1906.

62 In the Supreme Court of the District of Columbia.

No. 23267. In Equity.

ELLA ELROY ET AL.

vs.

HARRY J. MCGOWAN ET AL.

The President of the United States to Ella Elroy, John H. Simms, Annie Gill and John Gill (her husband), Harry Simms, William Simms, Lillie Hall and George Hall (her husband), Sallie Eberhart and John Eberhart (her husband), Edna Clark, Sarah Starnell, Ida German and George German (her husband), Mary English and James English (her husband), John W. Elliott, Virginia McLane and William McLane (her husband), and Lillie Mills and Cary Mills (her husband), Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal specially allowed by the Court of Appeals, on the 14th day of May, 1906, wherein Harry J. McGowan and Jesse A. McGowan are Appellants, and you are Appellees, to show cause, if any

there be, why the Decree of May 4, 1906, rendered against the said Appellants, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 16th day of May, in the year of our Lord one thousand nine hundred and six.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Service of the above Citation accepted this — day of —, 190—.

\_\_\_\_\_,  
*Attorney for Appellee.*

[Endorsed:] No. 23267. Equity. Ella Elroy *et al.* vs. Harry J. McGowan *et al.* Citation. Issued May 16, 1906. Served copy of the within Citation on Charles Bendheim, Att'y for Appellees. May 18, 1906. Aulick Palmer, Marshal. B. Chas. T. Hendler, Attorney for Appellant. Filed May 18, 1906. J. R. Young, Clerk.

63 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 62, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made a part of this transcript, in cause No. 23267 In Equity, wherein Ella Elroy, *et als.* are Complainants and Harry J. McGowan, *et als.*, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 25<sup>th</sup> day of May, A. D. 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1677. Harry J. McGowan *et al.*, appellants, vs. Ella Elroy *et al.* Court of Appeals, District of Columbia. Filed May 25, 1906. Henry W. Hodges, Clerk.

---

---

IN THE  
Court of Appeals of the District of Columbia

---

APRIL TERM, 1906.

---

HARRY J. MCGOWAN and  
JESSE A. MCGOWAN,

Appellants,

No. 1677.

VS.

No. 10, SPECIAL CALENDAR.

ELLA ELROY, et al.

---

Brief on Behalf of the Appellants

CHARLES T. HENDLER,

Solicitor for Appellants.



IN THE

**Court of Appeals of the District of Columbia**

---

**APRIL TERM, 1906.**

---

**HARRY J. MCGOWAN and  
JESSE A. MCGOWAN,**

**Appellants,**

**vs.**

**ELLA ELROY, et al.**

**No. 1677.**

**No. 10, SPECIAL CALENDAR.**

---

**BRIEF ON BEHALF OF THE APPELLANTS.**

---

**Statement of Facts.**

This is an appeal from a decree of the Supreme Court of the District of Columbia sustaining a demurrer to a petition for leave to file a bill of review.

The facts are fully set forth in the petition (Record pp. 26-32), and, briefly stated, are as follows:

Mrs. Susan Turner had been for many years a resident of the District of Columbia, and was such resident at the time of her death.

On the 17th day of January, 1901, she was, and for a long time previously had been, seized in fee of the west one-fourth full part of lot No. 4 in Square No. 227 in the City of Washington, District of Columbia. This was all of the real estate which she possessed. On that date she executed her last will and testament (Record, p. 26), in which the appellants are named as sole devisees and beneficiaries. On the 29th of March, 1901,

Mrs. Turner executed a deed of conveyance of the said real estate to the appellants. She died on the 11th of January, 1902, and her will was filed in the Office of the Register of Wills on the 6th of February, 1902.

The appellees filed the original bill in the Supreme Court of the District of Columbia on the 19th of April, 1902. This bill, among other things, alleged that at the time of the execution of each of these paper writings Susan Turner was mentally incapacitated, and that both of the instruments were obtained by fraud and undue influence. The bill prayed for the cancellation of the deed, and that the will be decreed not to be the will of Mrs. Turner. (Record, pp. 2-8.)

To this bill appellants filed a demurrer (Record, p. 9), and on hearing this demurrer was sustained, with leave to complainants to amend their bill (Record, p. 10).

An amended bill was filed February 17, 1903, the allegations of which and the relief prayed were practically the same as in the original bill, except that it was alleged that Susan Turner died intestate, all references to the will were omitted and no relief was asked in regard thereto. (Record, pp. 10-17.) To the amended bill also appellants filed a demurrer (Record, p. 17), and on hearing this demurrer was overruled, with leave to appellants to answer (Record, p. 18).

On the 16th of May, 1903, appellants filed their answer, in which they denied that Susan Turner was mentally incompetent and that the said deed of conveyance was obtained by fraud and undue influence. The answer also denied that Susan Turner died intestate, and averred that she left a last will and testament. (Record, pp. 18-21.) Issue was thereupon joined (Record, p. 21), and a great deal of testimony was taken.

Thereafter the cause came on for hearing, and on the 10th of February, 1905, a decree was signed canceling the deed of conveyance, decreeing possession of the real estate to the appellees, and that appellants account for the rents, issues, and profits. (Record, pp. 22-23.)

On the 16th of February, 1905, a petition was filed in the Probate Court praying for the probate and record of Susan Turner's will. (Record, p. 29.) On the same day a petition

was filed in this equity cause for a rehearing, and praying that on such rehearing the decree might be modified by striking out so much thereof as decreed possession of the real estate to the appellees and that appellants account for the rents, issues, and profits, or else be suspended as the final action of the Court until there should have been a final judgment of the Probate Court upon the question of the validity of the will. (Record, p. 23.) This petition was overruled and a rehearing denied. (Record, p. 25.)

Appellants, having been in possession of the real estate since the date of the death of Susan Turner, on the 1st day of June, 1905, vacated the premises on the demand of appellees' attorneys. (Record, p. 29.)

On the 26th of June, 1905, a caveat was filed in the Probate Court by the appellees contesting the validity of Susan Turner's will, and thereafter issues were framed for trial by a jury. These issues were as to the due execution of the will, the mental capacity of Susan Turner, and as to fraud and undue influence in procuring the execution of the will. (Record, p. 30.)

These issues came on for trial before a jury on the 8th day of March, 1906, and all of the parties to the equity cause were in Court on that proceeding. (Record, p. 30.) On the 20th of March, 1906, the jury returned a verdict sustaining Susan Turner's will. (Record, p. 30.) On the 23d of April, 1906, the will was admitted to probate and record as the will of Susan Turner of real and personal property. (Record, p. 32.)

On the 23d day of April, 1906, a petition was filed by appellants in the equity cause, setting forth the foregoing facts in detail and also that there was error of law apparent on the record, and praying for leave to file a bill of review to the end that the decree of February 10, 1905, might be reviewed and reversed (especially in so far as it decreed possession of said real estate to the appellees, and that appellants account for the rents, issues, and profits thereof, and that appellants pay the costs of said proceeding) and for the appointment of a receiver and a temporary restraining order pending action on the bill of review. (Record, pp. 26-32.) Upon filing said petition a rule to show cause why the prayers of said petition should

not be granted was issued directed to the appellees. ( Record, p. 33.)

An answer, by way of demurrer, was filed by the appellees (Record, p. 33), and on the hearing thereof said demurrer was sustained and appellants denied the relief prayed. (Record, p. 34.)

Thereupon a petition was filed in this Court praying the allowance of a special appeal from the last named decree, which was allowed on the 14th of May, 1906. (Record, p. 35.)

### ASSIGNMENT OF ERROR.

The Court below erred in sustaining said demurrer and denying appellants leave to file a bill of review.

### ARGUMENT.

The decree which it is sought to have reviewed was signed and enrolled on the 10th of February, 1905, so that we were well within the limitation fixed by Equity Rule 88 of the Rules of the Supreme Court of the District of Columbia.

#### I.

The appellees are in possession of the real estate under the decree, and appellants are decreed to account for the rents, issues, and profits during the time they were in possession. It being after the term, there is no other way than by a bill of review to reach and affect this decree of February 10. Should this decree remain unreversed, appellants will, under any circumstances, be compelled to account for the rents of real estate the possession of which, under the will that was duly probated, they were entitled to as against the whole world.

“A bill of review is used to procure the reversal of a decree after signature and enrollment. It may be brought upon error of law apparent on the decree, or on occurrence or discovery of new matter. (Adams' Equity, 416.)

The rule as to bills of review and the causes for which they will lie was laid down by Lord Bacon in his ordinances. They have never since been departed from, and have come to be the fundamental law on the subject. The first of these ordinances, and the one with which we are particularly concerned, reads:

"No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review. And no bill of review shall be admitted except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used, when the decree was made. Nevertheless, upon new proof, that is come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise."

Story's Eq Pl., sec. 404.

Purcell v. Miner, 4 Wall. 521.

"The ordinances of Lord Bacon still govern bills of review. They may be filed for error in law appearing in the decree, or for new matter or proof material in the case, of which the party had no knowledge at the hearing. There is some contrariety in the decisions, whether the newly discovered matter must not be such as would have been pertinent to the issue at the hearing. But the better opinion seems to be, that this is not necessary. If the matter be of a nature to have changed the decree, though foreign to the issue, it affords ground for a review."

Massie's Heirs v. Graham's Adm'rs, 3 McLean, 41, 42.

"By the established practice of the court, there are two sorts of bills of review, one founded on supposed error appearing in the decree itself, the other on new matter which must arise after the decree, or upon new proof

which could not have been used at the time when the decree passed."

Norris v. LeNeve, 3 Atkyns. 26, 35.

A bill of review lies for new matter arising after the decree was rendered.

16 Cyc. Law and Proc. 532.

Hill v. Phelps, 101 Fed. Rep. 650, 651.

Riddle's estate, 19 Pa. St. 431, 433.

Bush v. Madeira, 14 B. Mon. 172.

"Any matter clearly showing that a decree is improper, though not obtained by fraud, collusion or surprise, may be made the ground for impeaching the decree by an original bill in the nature of a bill of review."

Gregory v. Lenning, 54 Md. 51.

See also Whiting v. Bank of U. S., 13 Pet. 6, 13.

Buffington v. Harvey, 95 U. S. 99.

"But if a case were to arise, in which the new matter discovered could not be evidence of any matter in issue in the original cause and yet clearly demonstrated error in the decree, it should seem, that it might be used as ground for a bill of review, if relief could not otherwise be obtained."

Story's Equity Pleadings, sec. 415.

In the case of Ballard v. Searls, 130 U. S. 50, will be found an involved state of facts analogous to the case at bar. Searls filed a bill against one Worden for infringement of letters patent. A decree was entered in his favor for damages and costs. Worden appealed but gave no supersedeas bond. Execution was issued on the decree and levied on certain lots the property of Ballard. Searls then filed a bill in aid of execution praying to have the conveyance by Worden to Ballard of

the lots levied upon set aside as made to defraud Worden's creditors. On final hearing of that case the conveyance was set aside as fraudulent, from which Ballard took an appeal. In the meantime Worden's appeal in the patent suit was reached in the Supreme Court of the United States, and, after hearing, the court below was reversed. Thereupon Ballard moved in his case, on the records in the two cases, to reverse the decree and remand the cause with direction to dismiss the bill. In disposing of the motion the Supreme Court of the United States held that it could not properly be granted, but remanded the cause with instructions that Ballard be allowed to file such supplementary bill as he might be advised, in the nature of a bill of review, or for the purpose of suspending or avoiding the decree, upon the new matter arising from the reversal of the former decree.

## II.

What was there to hinder or prevent the appellees from bringing an action of ejectment? Nothing at all. Was the relief granted in the decree that it is sought by appellants to have reviewed in any wise different from the relief that would have been given to the appellees if they had been successful in an action of ejectment? Most certainly not. This being so, the law court is the forum in which they should have sought relief.

In the judiciary act of 1789 it is enacted that "suits of equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law." This is section 723 of the Revised Statutes of the United States.

The Supreme Court of the United States held in *Buzard v. Houston* (119 U. S. 351) that this was intended to secure to a defendant the constitutional right to a trial by jury. In *New York Guaranty Co. v. Memphis Water Co.* (107 U. S. 214), in speaking of this section of the judiciary act, the court said:

"This enactment certainly means something; and if only declaratory of what was always the law, it must

at least have been intended to emphasize the rule, and to impress it upon the attention of the courts."

The point has been well stated by this Honorable Court:

"It is a settled principle of equity jurisprudence that courts thereof have no jurisdiction to grant relief where plain and adequate remedy can be had at law. This rule is necessarily most closely adhered to in all of the United States courts. It is declared in the judiciary act, in strict accord with those provisions of the Constitution which established the distinction between law and equity, and preserve the right of trial by jury in all cases at law where the value in controversy shall exceed \$20. This right is not compensated by sending issues out of chancery to be tried by jury, and is therefore to be carefully guarded from the encroachments of courts of equity." (*Hess v. Horton*, 2 Ap. D. C. 85.)

A glance at the amended bill is sufficient to demonstrate that it is an example of the old, familiar effort (in this case successful) to make a bill in ejectment hold good in equity. The appellees had a plain, adequate, and complete remedy at law; and therefore the Equity Court was without jurisdiction in this case at bar, and the amended bill should have been dismissed on the hearing of the demurrer of appellants.

"Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." (*Hipp v. Babin*, 19 How. 271.)

"Absence of a plain, adequate, and complete remedy at law is the only test of jurisdiction." (*Thompson v. R. R. Co.*, 6 Wall. 137.)

"All actions which seek to recover specific property, real

or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages \* \* \* are legal actions, and can be brought in the federal courts only on their law side." (Scott *v.* Neely, 140 U. S. 110.)

"The United States claim, and if the allegations of the bill can be supported by proof, own the legal title to the lands described, a title paramount to that under which the appellee claims; for the deed to the United States conveys, if it is effective, the title which Allen had when the tax was assessed in July, 1867, and operates by relation from that time. Having the legal title, then, but being kept out of possession by defendants holding adversely, the remedy of the United States is at law to recover possession. Equity in such cases has no jurisdiction, unless its aid is required to remove obstacles which prevent a successful resort to an action of ejectment, or when, after repeated actions at law, its jurisdiction is invoked to prevent a multiplicity of suits, or there are other specific equitable grounds for relief." (United States *v.* Wilson, 118 U. S. 89.)

"In the present bill no circumstances are alleged to except the case from the general rule. The defendant did not sustain towards the complainants at any time any relations of trust and confidence; he was not their agent; and any right which they can assert against him for the rents and profits of the estate is altogether dependent upon their title to that estate, and cannot arise until that has been established. The title which they assert to that is not an equitable, but a legal title as heirs at law and next of kin of Sarah Ann Dorsey, and is to be established and enforced by a direct proceeding at law for the recovery of the possession which they allege the appellee illegally withholds. There is no ground, therefore, on which the bill can be supported for the account as prayed for." (Ellis *v.* Davis, 109 U. S. 485.)

"It is as well settled as any proposition of law can be

that equity will not ordinarily entertain a bill for the purpose of establishing title or for the recovery of the possession of real estate." (Root v. Woolworth, 150 U. S. 410.)

"A court of equity has no jurisdiction over a suit based upon an equitable title to real estate, unless the relief asked for is also equitable. The relief prayed for is such as a court of law is competent to grant, if the plaintiff's title would justify it. But the plaintiff does not seek by her bill to better her title. If all the relief asked for were granted, she would still have an equitable title only. The case is therefore, an ejectment bill brought on an equitable title." (Fussell v. Gregg, 113 U. S. 554.)

"A bill will not lie where ejectment would afford a plain, adequate, and complete remedy." (Killian v. Ebbinghaus, 110 U. S. 573.)

See also Ins. Co. v. Bailey, 13 Wall. 621.

Grand Chute v. Winegar, 15 Wall. 373.

Lewis v. Cocks, 23 Wall. 466, 470.

Root v. R. R. Co., 105 U. S. 189.

Jenkins v. Harman, 26 Fed. Rep. 661.

The following statement of this doctrine by the Maryland Court of Appeals is particularly apt in its application to the case at bar :

"The doctrine that the aid of equity cannot be invoked in a case where the remedy at law is plain, adequate, and complete, is co-eval with the foundation of equity jurisprudence, and no instance of its application is more familiar or important than where the courts forbid an action of ejectment from being carried on under the form of a bill in chancery." (Hecht v. Colquhoun, 57 Md. 567.)

The doctrine as it was stated by this Honorable Court in the case of Williams v. Paine (7 Ap. D. C. 132) is peculiarly applicable to the case at bar :

"It is certainly the well-established doctrine of a court of equity that it will not entertain suits for establishing

legal titles and that such doctrine is founded upon the clearest reason, and the departing from that practice, where there is no necessity for so doing, would be subversive of the legal and constitutional distinctions between the different jurisdictions of law and equity."

Even where equity and law have concurrent jurisdiction equity will not relieve on the mere ground of difficulty of defense at law. It must be a case where it is impossible to make the defense at law (*Miller v. Duvall*, 26 Md. 47.)

Nor was it proper to retain the bill in the Equity Court on the theory that that court was better adapted for the adjustment of the account for rents and profits. Here, too, the remedy at law was plain, adequate, and complete.

"Nor can the court retain the bill, under the impression that a court of chancery is better adapted for the adjustment of the account for rents, profits, and improvements. The rule of the court is, that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that court will direct an account as an incident in the cause.

"But when a party has a right to a possession, which he can enforce at law—his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction." (*Hipp v. Babin*, 19 How. 279.)

It may be insisted that the charging of undue influence and lack of capacity gave the Equity Court jurisdiction. This can not be so. If it were so, then in any case it would only be necessary to make these allegations in general terms in order to change an action at law into a suit in equity. Happily, this is not the law. If it were, the right of trial by jury would long since have ceased to exist.

"It is full of the words fraudulent and corrupt, and general charges of conspiracy and violation of trust obligations. Mere words in and of themselves, and even as

qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief." (Van Weel v. Winston, 115 U. S. 237.)

"A court of equity when examining a bill of complaint to find a grievance which will justify its interposition, looks to the substantive facts averred in it, not to the adjectives or adverbs which may be added to qualify them." (Lumley v. Wabash Ry. Co., 71 Fed. Rep. 28.)

"The allegation of fraudulent proceedings respecting the acquisition of the title does not convert an action at law into a suit in equity." (Smythe v. N. C. Canal & Bk. Co., 141 U. S. 661.)

See also Ambler v. Choteau, 107 U. S. 591.

Kent v. Sup. Can. Co., 144 U. S. 91.

Fogg v. Blair, 139 U. S. 118.

It may be contended, based on paragraph 14 (Record, p. 15), that the amended bill was a bill to remove cloud from title, and that it was proper to retain the bill on that account. This, too, is fallacious; for the same paragraph sets out the fact that appellants were in possession of the real estate.

Under the jurisdiction and practice in equity a bill to quiet title cannot be maintained without clear proof of both possession and legal title.

Frost v. Spitley, 121 U. S. 552.

United States v. Wilson, 118 U. S. 89.

Orton v. Smith, 18 How. 263.

Morrison v. Marker, 93 Fed. Rep. 695.

Root v. Woolworth, 150 U. S. 410.

Marks v. Main, 4 Mackey, 559.

Williams v. Paine, 7 Ap. D. C. 132.

The Equity Court was without jurisdiction to sign a decree in the form of the decree of February 10, 1905. The appellees, in paragraph 14 of the original bill (Record, p. 6), alleged the existence of the will and that appellants were the sole devisees named therein. They also asked for affirmative relief in regard to the will. With that fact in the record it was absolutely beyond the jurisdiction of the Equity Court to decree possession of the real estate to appellees.

Equity never did have jurisdiction to determine what was and what was not a man's will.

Broderick's will, 21 Wall. 503.

Ellis v. Davis, 109 U. S. 485.

Gaines v. Fuentes, 92 U. S. 21.

Simmons v. Saul, 138 U. S. 459.

However, even if equity might at one time have had jurisdiction in regard to wills, exclusive jurisdiction was by section 117 of the Code given to the Probate Court. In section 85 of the Code is found negative language denying jurisdiction to equity.

The original and amended bills constitute one record; so that the court below had before it the allegations in regard to the will when the decree of February 10, 1905, was signed.

French v. Hay, 22 Wall. 238, 246.

Glenn v. Sothoron, 4 Ap. D. C. 126, 127.

Stanford v. Murphy, 63 Ga. 410.

Bailey v. O'Bannon, 28 Mo. Ap. 39.

Ogden v. Moore, 95 Mich. 290.

Ray v. Womble, 56 Ala. 32, 37.

The original and amended bills being one record, and equity having no jurisdiction of the original bill, it was not possible to amend the original bill and so get rid of the will and give equity jurisdiction. The amended bill amounts to an averment that appellees sue as heirs at law—because, as they say, there is a will that is yet not a will. This the court below decided it could not do when the demurrer to the original bill

was sustained. And the court properly so decided under the authority of *Ellis v. Davis* (supra) and sections 117 and 85 of the Code.

"Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself." (*Shields v. Barrow*, 17 How., 130, 144.)

"Where an amended bill is sought to be filed which is based upon allegations contradicting those in the prior bill, those allegations being of substantial and basal facts, it seems to us the court may properly refuse to allow it to be filed. The bill is not stating new and additional facts; it is not alleging in a fuller or different way facts hitherto averred; it is not an amended bill, but it is a bill contradicting the basis upon which complainant sought to proceed." (*Met. Nat. Bk. v. St. L. Disp. Co.*, 38 Fed. Rep. 57.)

"The bill of the insurance company was filed to enforce a purely legal demand. It is clear that at that time equity did not have jurisdiction in attachment for purely legal claims. But it is insisted that the amended bill made a good case on the ground of fraud. The court had no jurisdiction of the cause, as it appeared on the face of the bill, and an amended bill could not be filed to give the court jurisdiction." (*Lively v. Winton*, 30 W. Va. 554, 559.)

See also *Bannon v. Comegys*, 69 Md. 411, 422.

*Pratt v. Bacon*, 10 Pick. 123, 127.

*Verplanck v. Merch. Ins. Co.*, 1 Edw. Ch. (N. Y.), 46, 52.

*Hill v. Hill*, 53 Vt. 578, 582.

*R. R. Co. v. Griffith*, 76 Va. 913, 923.

*Ogden v. Moore*, 95 Mich. 290.

*Crabb v. Thomas*, 25 Ala. 212.

*Carey v. Smith*, 11 Ga. 539, 546.

*Marble v. Bonhotel*, 35 Ill. 240, 248.

1 Dan. Ch. Pl. & Pr. (6th ed.), 425.

When the court below signed the decree giving possession of the real estate to the appellees it had before it the will of Susan Turner in which appellants were named as sole devisees of all of the decedent's real estate. Therefore, the equity court acted wholly without its jurisdiction in the premises. The equity court has no right to take title from one and confer it on another.

Hart v. Sansom, 110 U. S. 151, 155.

Orton v. Smith, 18 How. 263.

If the decree of February 10, 1905, is examined, it will be found that it is no more and no less than a judgment in ejectment would have been if appellees had brought such an action and had succeeded in maintaining it.

This question having been raised in the court below at every opportunity—twice on demurrer, at the final hearing, and again on the argument of the petition for rehearing—and the case being clearly and peculiarly one where appellants were entitled to have their constitutional right to a trial by jury preserved to them, it was the duty of the court to dismiss the bill. Even if this question were now raised for the first time, appellants are entitled to have the same disposition of the bill, in effect, by annulling the decree.

"In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel, nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize it and give it effect.

"It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury.

\* \* \* \* \*

"In the present case the bill seeks to enforce a merely legal title. An action of ejectment is an adequate remedy." (Lewis v. Cocks, 23 Wall. 466, 470.)

"It is also true that this objection need not always be raised by some pleading, but may be presented on the hearing even in the appellate court, and if not suggested by counsel may be enforced by the court on its own motion." (Southern Pacific R. R. Co. v. United States, 200 U. S. 341, 349.)

---

Therefore, it is submitted, the bill of review of appellants should have been allowed on both grounds—that is, because of the probate of the will naming them as sole devisees of the real estate in question, and also because of the error of law apparent on the record—and the decree of the court below sustaining the demurrer should be reversed.

Respectfully submitted.

CHARLES T. HENDLER,  
Solicitor for Appellants.

